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JAN 28 1963
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1962.

No. 568.

WILLIAM J. BATTEN and KATIE M. BATTEN,
His Wife, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR REHEARING.

Petitioners pray that petition for rehearing be granted, and that the court reconsider its order of January 7, 1963, denying the petition for certiorari herein.

ARGUMENT.

Petitioners respectfully submit that the court should reconsider its order of January 7, 1963, denying the petition for certiorari herein, and grant a rehearing thereon.

1. If this case is allowed to stand in its present position, it will present a situation charged with potential conflict, both among the federal courts and within the state and district of Oregon, and no doubt will become a breeding ground for litigation for some time to come. It is true that there is today no direct conflict in decisions by Courts of Appeals of different Circuits on the subject matter of the case now before the court. Yet there is every indication that the seeds of such conflict have been sown, and will without question present difficulty to lower courts for some time to come, unless this court now acts to clarify the Federal position.

There are currently four recent cases which have direct bearing on the dilemma of any lower court now considering a case of this nature. The first of these is *Highland Park* v. *United States*, (Ct. Cl. 1958) 161 F. Supp. 597, where the Court of Claims held that even though government aircraft had been flying at low altitude over plaintiff's property for many years, the Statute of Limitations on plaintiff's claim did not start running until the noise and disturbance caused by these aircraft created a substantial interference with plaintiff's property. Thus, the decision there indicates that the mere presence of aircraft in the column of air above private land does not constitute a taking of property, but rather that such a taking is only accomplished by the interference caused at the surface.

This position of the Court of Claims was made amply clear when the court said in *Jensen* v. *United States,* (Ct. Cl. 1962) 305 F.2d 444:

> "Unless there has been a significant depreciation in value or enjoyment of a property, this court has not considered the mere advent of jet aircraft as the signal of a taking."

Next was decided *United States* v. *15,909 Acres,* (D.C.S.D. Cal., 1958) 176 F. Supp. 447, proceeding in eminent domain. There the United States took avigation easements over certain properties, but other landowners sought to be included, although the government sought no easement over their properties. As to these other landowners, the United States District Court said:

> "When the jet planes began to fly over and *in the neighborhood of* the plaintiff's property the value of the property was affected * * * the government appropriated a flight easement in airspace over the land." (Emphasis supplied).

Thus, a Federal District Court in the 9th Circuit renders a decision making no distinction whether aircraft are *over* or *in the* neighborhood of the injured property, where the effect is the same. The decision easily squares with the prior *Highland Park* decision, making the critical element the injury done, rather than the location of the offending aircraft.

Following these cases came the decision by the court below in the instant case, directly holding that the critical element to recovery is the presence of aircraft in the column of air directly over private land, and that the absence of that element is fatal, no matter how great the injury done. This decision clearly varies from the prior decisions in that *for the first time* the fact that rights to use

and enjoy property are seriously impaired or destroyed is completely ignored.

The last case in the chain is the recent decision by the Oregon Supreme Court in *Thornburg* v. *Port of Portland*, 75 Adv. Sh. 375, ... Ore. ....., 376 P.2d 100, where, under a state constitutional provision identical to that of the United States Constitution, that court took a position directly opposed to that of the court below herein, and squarely held that a taking of private property was accomplished by a substantial impairment of the right to use and enjoy property caused by aircraft noise, whether the offending aircraft are above the land in question or not. The decision clearly squares with the prior federal decisions in *Highland Park* v. *United States*, *supra*, and *United States* v. *15,909 Acres*, *supra*, turning the decision on the reality of whether or not property rights have been lost, rather than on the technical distinction as to the location of the source of difficulty adopted by the court below.

Thus the decision below stands as a clear departure from the running current of thought in the recent cases. The difficult question which would now be presented a Federal Court sitting in Oregon is clear. Oregon is in the 9th Circuit. Shall such a court rule that substantial interference with rights to use and enjoy private property by operation of jet aircraft *in the neighborhood of* plaintiffs constitutes a taking, as indicated by another District Court of his own Circuit, and as clearly held by the highest court of the state in which he sits, or shall he ignore those decisions and follow the decision of the court below herein, as a decision of a higher Federal Court, but from a different circuit?

A further difficulty appears. How shall a court now decide where aircraft fly over a subdivision of closely

packed homes, passing over some, but not all? Shall one citizen have a claim, and his next door neighbor be denied?

2. The foregoing argument in favor of granting the petition for certiorari herein could not be fully developed in the petition for certiorari filed herein for the reason that the petition was filed prior to the decision by The Oregon Court. When considered with the reasons already advanced by petitioners in support of the petition for certiorari, petitioners believe that this case should clearly appear as one of paramount importance. The recent decisions show at every turn the variance of views among learned judges. The alacrity with which the highest court of a state acted to reject the reasoning of the court below points up the true divergence of views in no uncertain terms. Because of this divergence, it would seem that litigation on this subject will continue to build until this court finally speaks to settle the federal position. If this occurs, then petitioners will have been denied their opportunity to submit their cause to this court solely because they have come too early to the bar. In the light of all that petitioners have suffered so far, it would be manifest injustice to allow this to occur.

CONCLUSION.

The case at bar turns upon grave questions as to private rights in property. It involves the matter of whether the United States may with impunity destroy rights to use property so long as it sends no agent upon the property. If this decision stands, private rights to hold property in this land are seriously jeopardized. By far the greatest single benefit of living in a free nation is the right of the individual to own, use and enjoy property according to his own wishes, and if this right becomes im-

paired, the civil liberties which we so greatly cherish become but a hollow thing.

For these reasons, petitioners pray that a rehearing be ordered and that their petition for writ of certiorari be granted.

Respectfully submitted.

A. HARRY CRANE,
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CERTIFICATE.

A. Harry Crane, a member of the Bar of the Supreme Court of the United States, hereby certifies that the above and foregoing petition for rehearing is presented in good faith and not for delay, and that the same is based on substantial grounds now available to petitioners and not previously presented; that petitioners did not have an opportunity to fully develop arguments in their petition for a writ of certiorari brought about by authority cited herein, which authority had not been decided until after the filing of the petition for a writ of certiorari.

A. HARRY CRANE.